Is There a Moral Duty to Obey the Law?

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I. Introduction

The title of this article has been selected with care. Notice first that it is expressed in the form of a question. This is not done for rhetorical purposes, but to reflect genuine uncertainty about the answer. For most of my intellectual life, I have held a strong belief that there is no moral duty to obey the law. Recent reflection has led me to question my conviction on this matter. I now suspect that, under some legal systems, one can have a morally binding duty to obey the law. But suspicion is not conviction. The title is phrased as a question to indicate that the purpose of this article is to explore the issue rather than offer a conclusive argument for its resolution.

Next, notice that the title asks whether there is a moral duty to obey the *law*. This duty is often conflated with the duty to conform one's behavior to the dictates of the state–that is, with political obligation. However, that is not what this article is about. This article address the question of whether there is a moral duty to obey the law, not whether there is a moral duty to obey the state. The existence of the former does not imply the existence of the latter.

The law need not, and in fact, usually does not, consist in the command of a state authority. Despite theorists' nearly universal focus on legislation–the law consciously created by the agents of the state,–most of the operative law that sustains our contemporary commercial society was produced by evolutionary "common law" processes. Because these evolutionary forces can run independently of the state, there can be an obligation to obey the law without there being a concomitant duty to submit to state authority. Indeed, one implication of my thesis, should it prove out, is that the existence of a moral duty to obey the law is perfectly compatible

with the absence of legitimate political authority, and hence, with anarchy.

II. Laying the Groundwork: Definitions and Distinctions

A. Definition: The Duty to Obey the Law

In this article, I employ a fairly standard definition of the duty to obey the law. This has been concisely expressed by Matthew Kramer, who notes that "[f]or centuries, political and legal theorists have pondered whether each person is under a general obligation of obedience to the legal norms of the society wherein he or she lives. The obligation at issue in those theorists' discussions is usually taken to be prima-facie, comprehensively applicable, universally borne, and content independent."[2]

This definition highlights the four essential characteristics of the duty to obey the law. The first is that the duty to obey the law is a prima facie duty–one which, although binding under ordinary circumstances, can be overridden when more important moral considerations are at stake. This means that despite the moral duty to obey the law, there can be circumstances in which an individual acts morally by violating it, e.g., running a red light to rush a heart attack victim to the hospital. The second characteristic, that the duty is comprehensively applicable, means that those subject to the law are obligated to obey the law in its entirety–they may not pick and choose among the laws they are required to obey. The third characteristic, that the duty is universally borne, means that the duty applies to all parties within the law's jurisdiction. Finally, the fourth and most important characteristic of the duty to obey the law is that it is content independent. This means that one is obligated to obey the law simply because it is the law, and not because of the content of the legal rules. As explained by William Edmundson, "[a] content-independent duty effectively preempts the subject's individual assessment of the merits of the

action required by law and is categorical in the sense that it is not contingent upon any motivating end or goal of the subject."[3]

B. Distinction: the Duty to Obey the Law and Political Obligation

The duty to obey the law is not the same thing as political obligation. The duty to obey the law is a duty to conform one's behavior to the rules of a particular legal system. Political obligation is the duty to obey (and perhaps support and defend) the state in which one holds citizenship. Legal systems can and do exist that are not associated with any particular government or centralized political structure. A legal system may exist independently of any state. Therefore, it is possible to have a duty to obey the law without a duty to obey, support, or defend a state.

Nevertheless, the duty to obey the law is routinely conflated with political obligation. Because the state almost always administers the legal system–because state officials routinely speak with the voice of the law,–this is understandable. Further, the conflation usually causes no confusion. Most theorists who consider the duty to obey the law are actually seeking the basis for political obligation. Such theorists are interested in the duty to obey the law only because they view it as a necessary condition for the existence of political obligation. As William Edmundson points out, "[t]he question: Is there a duty to obey the law? seems particularly urgent insofar as a No answer calls into question the very possibility of a legitimate state."[4] Because these theorists consider the duty to obey the law only in the context of a state administered legal system, they have no reason to distinguish the duty to obey the law from political obligation. Hence, they do not.[5]

For purposes of the present article, however, it is essential to avoid conflating the duty to obey the law with political obligation. This is because I intend to present an argument that

provides a moral justification for the duty to obey the law, *but not for political obligation*. Indeed, I intend to suggest that there is a duty to obey the law even though there is no duty to obey the state–that the recognition of a duty to obey the law is perfectly consistent with philosophical anarchism.[6] It is therefore necessary to maintain a clear distinction between the duty to obey the law and political obligation.

C. Definition: Natural Duty Argument

The quest for the moral grounding for state authority is an ancient one. At least since Plato's Crito, philosophers have been seeking the argument that will establish that citizens have a moral obligation to obey the state. As a result, many different types of arguments have been offered in support of political obligation, and, hence, for the duty to obey the law that political obligation entails. It has become conventional to categorize these arguments into three basic types: associative–arguments "that appeal to the alleged normative importance of the fact that an agent occupies . . . the role of member in the political community to justify the duty to obey its laws,"[7]–transactional–arguments that "ground our duty (or obligation) to obey in our morally significant interactions with our states or fellow citizens,"[8]–and natural duty–arguments that "are predicated upon nothing more than the personhood of the duty-bearer."[9]

The argument being advanced in this article is a natural duty argument–one that derives the duty to obey the law directly from the moral obligations we are clothed with as human beings. It makes no appeal to duties that arise from one's role in a particular community and is not based on a claim that individuals have either implicitly consented to obey the law or otherwise interacted with others so as to give rise to such a duty. Rather, in what follows, I argue that the duty to obey the law arises directly out of the combination of the epistemic limitations inherent in the human

condition and the moral value of social peace.

III. The Challenges Facing a "Natural Duty" Argument

Many theorists have attempted to provide a natural duty argument for political obligation.[10] These attempts have given rise to a set of objections that beset any effort to demonstrate that human beings have a natural moral obligation to submit to the authority of a state. Although I will argue that human beings have a duty to obey the law, not the state, my argument will nevertheless have to overcome these hurdles. Hence, it is worth taking a moment to examine the most serious of them. These are the problems of identifying the morally compelling end the duty serves, problem of particularity, the problem of legitimacy, and the problem of harmless disobedience.

A. The Problem of the Morally Compelling End

No one, myself included, argues that the duty to obey the law is a fundamental moral duty–one that is worth complying with for its own sake or is somehow constitutive of the good. Making a natural duty argument for the duty to obey the law does not require one to claim that the duty to obey the law is itself a natural duty, but merely that its existence is essential for human beings to satisfy one of their natural duties–that compliance with the law is necessary for human beings to realize a more ultimate, compelling moral end.

William Edmundson represents the general form of a natural duty argument for the duty to obey the law as "(P1) whatever is typically a necessary means to a morally compelling end is at least a pro tanto duty; (P2) law-abidingness is typically a necessary means to a morally compelling end; therefore (C) law-abidingness is at least a pro tanto duty."[11] Edmundson notes that "[o]ne point of contention invited by such [arguments] is the specification of morally compelling ends."[12]

Another is the claim that the existence of a duty to obey the law is necessary for the realization of the specified end. To succeed, a natural duty argument must both identify a morally compelling end and demonstrate that without a duty to obey the law that end cannot be realized.

Theorists who make natural duty arguments have proposed several candidates for the morally compelling end that can be realized only if individuals have a duty to obey the law. For example, John Finnis argues that a duty to obey the law is necessary to resolve the coordination problems that would otherwise prevent the attainment of the common good.[13] Similarly, John Rawls and Jeremy Waldron argue that, when the law is a product of reasonably just political institutions, the duty to obey it is necessary to fulfill one's obligation to support just institutions.[14] Christopher Heath Wellman argues that fulfilling one's duty to obey the law is the only way to meet one's Samaritan duty to rescue the members of one's society from the dangers inherent in the Hobbesian state of nature.[15] Another example is supplied by David Lefkowitz who argues that a duty to obey the law is necessary to secure respect for human beings' basic moral rights, which requires "the creation and maintenance of political institutions that publicly enact, apply, and enforce laws."[16]

The stumbling block for natural duty arguments is usually establishing the required connection between the duty to obey the law and the morally compelling end. The main difficulty lies in demonstrating that individual *as opposed to general* compliance with the law is required to achieve the common good, maintain just institutions, escape the ravages of the state of nature, or secure basic rights. For example, Joseph Raz points out that although government may be necessary to resolve the coordination problems that impede the attainment of the common good, a comprehensively applicable, universally borne duty to obey the law is not required for it to do so.

Raz notes that although Finnis "properly explains why the law is a way of achieving coordination, . . . he never even attempts to show that coordination requires general obedience to law."[17] Similar difficulties plague the effort to derive a duty to obey the law from the natural duty to support just institutions. As A. John Simmons points out,

> actual governments have taken on many functions that have nothing obvious to do with the task of administering justice. So the scope of any authority they might wield . . . would appear to be far more limited than the authority actually claimed by modern states; and our duties to obey would seem to be correspondingly limited.[18]

And the matter is no better for claims that the duty to obey the law is necessary to rescue one's fellows from the Hobbesian state of nature or maintain a governmental structure sufficient to secure individual rights since any individual violation of the law can almost never lead to the collapse of the state, or for that matter, even have a noticeable effect on the state's ability to provide security or protect rights.

Hence, the first major challenge for a natural duty argument for the duty to obey the law is to show that the individual duty really is necessary for human beings to attain a genuine morally compelling end.

B. The Problem of Particularity

A second problem besetting all natural duty arguments for the duty to obey the law is what has been called the particularity problem. A natural moral duty is one that all persons possess in their capacity as human beings. How, then, can such a general duty bind individuals to any specific set of political institutions or code of laws?

As A. John Simmons explains this problem,

> Natural duties, remember, bind those who have them not because of anything those persons have done, or because of the special positions those persons occupy, but

> because of the moral character of the required acts. . . . This means that natural moral duties will bind me as strongly with respect to persons or institutions that are not close to me (or my own) as they will with respect to those that are. . . . [B]ecause this is true, it is difficult to see how a natural moral duty could ever bind citizens specifically to their own particular laws or domestic institutions. It is easy to see why Socrates should promote justice. It is much harder to see why Socrates should specially support Athens or regard himself as specially bound by Athenian law if it really is after all the importance of *justice* that explains his duty.[19]

I am a human being who lives in the state of Virginia in the United States of America. As a human being, I am invested with several fundamental moral duties with which I must comply if I am to behave in a morally proper way. But as noted above, the duty to obey the law is not itself one of these fundamental duties–it not a duty worth complying with for its own sake. The duty to obey the law, if it exists, is a derivative duty; one which must be derived from one of our fundamental moral duties. But how can any general moral duty bind me to obey the law of Virginia rather than that of Maryland or the District of Columbia? I may have a duty to comply with a set of laws that maximizes the good, or promotes individual human flourishing, or embodies the ideal of justice, or perhaps, is merely the closest approximation of the ideal of justice that exists in the real world. But how can that give rise to a duty to obey the law of the jurisdiction in which I reside unless its law happens to be the one that possess the essential characteristic?

Answering this question is the second major challenge for a natural duty argument. To succeed, such an argument must explain how complying with the underlying natural duty requires obeying the law of the particular legal system governing one's community.

C. The Problem of Legitimacy

A third challenge for any natural duty argument for the duty to obey the law is to establish

that the relevant legal institutions have legitimate authority over those subject to it. Meeting this challenge requires something more than merely showing that those institutions can be morally justified. This is because there is a significant conceptual distinction between the justification of an institutional arrangement and its legitimacy with respect to individuals subject to it. Once again, A. John Simmons provides a useful explanation of this distinction.

> We can justify arrangements simply by demonstrating that their existence is a good thing, that we have good reason to create or refrain from destroying such things. We justify them by showing that arrangements have value, that their benefits outweigh their costs, that they possess interesting virtues. By contrast, legitimating an arrangement that involves some claiming the authority to control others involves showing that a special arrangement of a morally weighty kind exists between those persons, such that those persons should have authority and those particular others should have a duty to respect that authority. This kind of legitimation simply cannot be demonstrated by merely pointing to the justifying virtues of an arrangement, . . . Only a legitimating special relationship, not a justifying virtue or benefit, can ground claims of authority and subjection. Control of some by others is personal; so must be its legitimation. The impersonal virtues of arrangements involving control simply do not entail personal legitimations of control.[20]

This distinction between justification and legitimacy indicates that showing that a body of law serves a morally compelling end is not in itself sufficient to establish that citizens have a moral obligation to obey it. To the extent that the law invests some human beings with the authority to control the behavior of others, a showing that there is a moral basis for the exercise of that authority–that the authority is legitimate–is required as well. This is the third major challenge facing a natural duty argument for the duty to obey the law.

D. The Problem of Harmless Disobedience

Finally, there is the problem of harmless disobedience, sometimes referred to as the problem of the stop sign in the dessert. One of the defining characteristics of the duty to obey the law is that it is comprehensively applicable. This means that those subject to the law have a prima

facie obligation to obey all laws simply because they are laws. The problem is that "there is nothing even pro tanto wrong with disobeying the law when there is a vanishingly low chance of harm and a palpable benefit to be gained."[21] Or, as Christopher Morris points out, "[t]here are numerous laws that it seems reasonable not to obey on some occasions–for example, coming to a *full* stop at a stop sign on a deserted road where there is good visibility."[22]

Natural duty arguments for the duty to obey the law are instrumental arguments. They contend that the duty to obey the law is necessary to achieve some more fundamental moral end. But, "[a] specific individual's failure in a particular case to obey certain traffic laws, tax laws, environmental regulations, and many other types of laws, will often have no discernable effect, or even any effect at all, on the ability of the state to provide its subjects with secure enjoyment of their basic moral rights."[23] This suggests that a duty to obey the law that requires "universal obedience is as a matter of fact not necessary to achieve plausible social ends–such as order, harmony, or substantive justice."[24] Hence, the fourth major challenge for a natural duty argument is to explain why the underlying morally compelling end cannot be realized unless individuals have a duty to comply with *all* the laws of a jurisdiction, even those whose disobedience appears to be harmless.

IV. An Epistemic Argument for the Duty to Obey the Law

As I noted at the outset, for most of my life I have believed that there is no moral duty to obey the law. As I saw it, our actions are either morally obligatory, morally prohibited, or morally permissible. When the law embodies our moral obligations, adding a duty to obey the law is redundant and adds nothing of significance to our underlying obligations. When the law conflicts with our moral obligations–when it imposes a legal duty to act in a way that violates our

underlying moral obligations–the existence of a moral duty to obey the law is both pernicious–it instructs us to act immorally–and paradoxical–it creates a *moral* obligation to act *immorally*. And when the law enjoins us to take one morally permissible action rather than another, a duty to obey the law requires us to relinquish our autonomy and conform our behavior to the will of others with no assurance that their moral judgment is superior to ours. In essence, a duty to obey the law creates an obligation to alienate our own moral judgment–an obligation to "just follow orders" even when we believe that that is not the right thing to do. And this, I believed, could not be right.

Recent reflection has led me to conclude that this line of thinking is flawed in at least two respects. First, by naively assuming that one can always know whether a particular action is morally obligatory, morally prohibited, or morally permissible, it fails to consider the limitations on human beings' intelligence and ability to gather knowledge. Yet, these limitations imply that there are instances in which one *can* have a moral obligation to alienate one's personal moral judgement. Second, by assuming that the duty to obey the law requires individuals to submit to the will of others, it, like the traditional arguments on the subject, improperly conflates the duty to obey the law with political obligation.

I now believe that there may indeed be a duty to obey the law. Specifically, when the law arises through an evolutionary process of settling interpersonal disputes–when the law is created by a process productive of social peace–there can be a moral obligation to conform one's behavior to the law. To show that this is the case, I will present an argument that proceeds in three steps. First, I will show that, due to epistemic limitations, human beings are sometimes morally obligated to alienate their personal moral judgment, or, at least, to refrain from acting upon it. Second, I will show that living in a society governed by a customary/common law legal system comprises

such a situation and gives rise to a duty to obey the law. Finally, I will show that the duty to obey the law of a customary/common law legal system is well-grounded because compliance with it is necessary for human beings to fulfill one of their natural moral duties.

A. Step 1: The Professional Obligation of Attorneys

Although human beings are generally required to act in accordance with their best moral judgment, there are specific situations in which not only are they not required to act on their own judgment, but it would be wrong for them to do so.

Professionals often find themselves in such situations. For example, trustees have a duty to use their best judgment to advance the specified interests of beneficiaries, even when they personally believe that the beneficiaries do not deserve the benefits and that the resources would be better employed by others. Similarly, clergymen have a duty to keep their parishioners' communications confidential, even when they believe that disclosure is necessary to protect third parties from harm or would be fairer to all parties concerned. Physicians have a duty to refrain from acting without their patient's informed consent, even when they personally believe that treatment represents the ethical course of action. And attorneys have a duty to serve the interests of their clients, even when they personally believe that justice demands that their clients' interests be thwarted. In each case, the duty to refrain from acting on one's own moral judgment is justified by the need to attain an important moral end served by the professional system as a whole.

To see what bearing this has on the duty to obey the law, let us examine attorneys' professional obligations more closely. Attorneys are subject to the Canon of Ethics that requires them to assume a fiduciary obligation to their clients. Under the Canon of Ethics, attorneys are required to keep their clients' communications confidential[25] and to zealously represent their

clients' interests[26] to the exclusion of the interests of both other individuals and society as a whole. Attorneys may depart from this fiduciary relationship only in a small and definitely identified class of exceptional cases.

These requirements mean that attorneys are often called upon to act in ways that conflict with their personal moral judgment. They must argue for the enforcement of contracts whose terms they regard as overly harsh or inequitable. They must provide the best defense they can to individuals and corporations in tort actions despite their personal belief that fairness requires their client to compensate those they have injured. They must attempt to uphold property rights even in cases in which they believe it would be better for society if the property were redistributed. They must protect the civil liberties of parties that they believe should be locked away such as terrorists, rapists, child molesters, or racists. And they must refrain from disclosing the contents of confidential client communications even when they believe that disclosure would prevent serious suffering by others and otherwise better serve the interests of justice. Under the Canon of Ethics, attorneys have a moral obligation to act in ways that they would otherwise regard as morally wrong.

What justifies such an obligation? In the Anglo-American legal system, it is the recognition of the epistemic limitations of human beings. Attorneys' fiduciary obligation to their clients is justified on the ground that it is a necessary feature of an adversarial system of justice. And an adversarial system of justice is justified on the ground that it is the most effective way to address the limitations on human beings' ability to discover the truth.

Law is concerned with interpersonal human conflict. Human beings have both limited knowledge and limited ability to distance themselves from their own goals. Hence, we are aware

that we do not have direct access to objective truth. As illustrated by the famous Akira Kurosawa movie, *Rashomon*, we know that our perceptions of reality are affected by our interests.

The foundation of the adversarial system of justice is the belief that letting each party tell his or her story to an impartial decision maker will get as close to the truth as is humanly possible–that the clash of opposing stories will burn away falsehood and biased judgment to reveal the truth and produce a just result. This belief is justified, however, only if all parties are able to tell their story effectively. This implies that for an adversarial system of justice to work, all parties to a legal dispute need access to a skilled advocate who can make sure that their side of the story is adequately presented. For such an advocate to be able to perform his or her function effectively, the advocate needs the client's full confidence–the client's willingness to relate all the details of the case no matter how unfavorable, embarrassing or threatening to the client's future interests they may be. Only one who undertakes a fiduciary obligation to the client–an obligation to preserve the client's confidential communications and to employ the information gained exclusively for the client's benefit–can generate this level of confidence. Supplying each potential litigant with an expert representative who has undertaken the obligations described in the Canon of Ethics is necessary to maintain the likelihood that the justice system actually produces a just result.

The adversarial system of justice is a discovery device. It is designed to overcome human beings' epistemic weaknesses and provide a more accurate account of the demands of justice than individuals can obtain by directly employing their partial and somewhat biased knowledge. A useful analog for the adversarial system may be found in contemporary prediction markets. By allowing numerous parties with different information and viewpoints to back their predictions of

future events with financial investments, these markets frequently provide more accurate information about such events than do the most well-informed individual experts.[27] Similarly, an adversarial system of justice provides a forum for the interaction of parties with different information and viewpoints that frequently produces a closer approximation of justice than can be obtained by consulting the opinion of even the most experienced jurist.

We can now see that the justification for the attorney's professional obligation is that it is a component part of a social institution that helps human beings achieve justice. The social institution itself is a learning system by which human beings seek to overcome the epistemic limitations that prevent them from perceiving justice directly.

This does not mean that attorneys always act wrongly by failing to comply with their obligations under the Canon. There will be cases in which attorneys can have a high degree of certainty that adhering to the Canon will produce morally pernicious results. In such cases, the morally proper course of action for an attorney may be to violate his or her professional obligation. But this shows only that the attorney's professional obligation is prima facie rather than absolute. Given human beings' epistemic weaknesses, it is rational to doubt individuals' ability to accurately determine which cases are the exceptional ones in which violating one's professional duty is the proper course of action. For this reason, the claim that attorneys have a prima facie duty to conform their behavior to the requirements of the Canon of Ethics–one which can be overcome only by extremely strong evidence that violating the duty serves a more important moral end–is well grounded.

Note also that attorneys' professional obligations require them to conform to the provisions of the Canon, not the conscious instructions of other human beings. Attorneys are

morally bound to act in certain ways, not to submit to the will any other human authority. Although attorneys are bound, they are not bound to a master.

In sum, attorneys have a prima facie duty to conform their behavior to a code of rules even when doing so conflicts with their personal moral judgment. Yet this duty does not require them to submit to the conscious authority of any human agency or commit them to comply with commands to engage in immoral action. Indeed, its very purpose is to help human beings better serve the interests of justice.

The duty to obey the law similarly requires individuals to conform to a code of rules even when doing so conflicts with their personal moral judgment. Could this duty have a similar character to that of the attorney's professional obligation?

B. Step 2: The Nature of the Duty to Obey the Law

I will argue that the answer to this question is "yes" *when the law is the product of a customary/common law evolutionary process rather than the product of conscious legislation.* Notice that the italicized clause places a significant limit on the range of application of my conclusion. Although I am arguing that the duty to obey the law is analogous to the professional obligation of attorneys, I am also arguing that the analogy holds only when the duty is associated with customary and common law legal systems. This excludes almost all the legal systems of contemporary states in which designated agents of the government are empowered to consciously create law through legislation. Hence, although this analogy may support an argument for a duty to obey the law, it cannot support an argument for a duty to obey the state. This analogy cannot provide a grounding for political obligation.

Drawing the analogy requires brief descriptions of the nature of customary and common

law legal systems.[28] Let's begin with customary law.

Customary law is law that arises out of human interaction. It "is not the product of official enactment, but owes its force to the fact that it has found direct expression in the conduct of men toward one another."[29] The existence of customary law is merely a reflection of the twin facts that to live together human beings must know what to expect of each other and that it is epistemically impossible for human beings to specify in advance through language the behavior to be expected in the myriad situations that constitute life in society. Customary law is essentially a system of communication that enables humans to coordinate their social interaction so as to avoid violence and facilitate joint pursuits.

> [C]ustomary law can best be described as a language of interaction. To interact meaningfully men require a social setting in which the moves of the participating players will fall generally within some predictable pattern. To engage in effective social behavior men need the support of intermeshing anticipations that will let them know what their opposite numbers will do, or that will at least enable them to gauge the general scope of the repertory from which responses to their actions will be drawn. We sometimes speak of customary law as offering an unwritten code of conduct. The word code is appropriate here because what is involved is not simply a negation, a prohibition of certain disapproved actions, but also the obverse side of this negation, the meaning it confers on foreseeable and approved actions, which then furnish a point of orientation for ongoing interactive responses.[30]

Customary law exists when members of the relevant community have had sufficient interaction to be able to predict how others will react to their behavior and to incorporate this prediction into their decisions about how to behave. That is, customary law is law that arises from the formation of "interactional expectancies."

> Instead, therefore, of speaking vaguely of an obligation arising through mere custom or repetition, it would be better to say that a sense of obligation will arise when a stabilization of interactional expectancies has occurred so that the parties have come to guide their conduct toward one another by these expectancies.[31]

Because of the way it is formed, customary law is not necessarily rational in any means-ends sense of rationality. The rules that evolve are not necessarily those that produce the most logical solution to the problem they address, but merely those that facilitate the peaceful interaction of the members of the community with regard to it.

> Generally we may say that where A and B have become familiar with a practice obtaining between C and D, A is likely to adopt this pattern in his actions toward B, not simply or necessarily because it has any special aptness for their situation, but because he knows B will understand the meaning of his behavior and will know how to react to it.[32]

Customary law is law that evolves to solve coordination problems. Its rules, which are "the result of human action, but not the execution of any human design,"[33] serve no overriding moral purpose other than to facilitate peaceful human interaction. Customary law is essentially a discovery device that teaches human beings what forms of behavior most effectively discourage violence and promote cooperative activities. It is a mechanism human beings employ to overcome the epistemic limitations that make it impossible for them to specify the rules that best facilitate these ends in advance of experience.[34]

Now let us turn our attention to common law systems.

The term "common law" can be problematic because it has both a specific and a generic meaning. When used specifically, it refers to the historical output of, at first, the royal courts of England, and later, the state supported courts of the United Kingdom, the United States, and other British Commonwealth countries. But it can also be used generically to refer to the output of any court system in which the rules are abstracted from the decisions rendered in actual cases. In this article, I am using the term in its generic sense. For present purposes, a common law legal system should be understood as one in which the developmental processes of the customary law

have become regularized and take place within a specific set of courts.

Through the middle to later part of the nineteenth century, this was a reasonably accurate description of the British and nascent American legal systems. Blackstone defined the common law of England as the "general customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification,"[35] and Frederick Pollock noted that "the common law is a customary law if, in the course of about six centuries, the undoubting belief and uniform language of everybody who had occasion to consider the matter were able to make it so."[36] Harold Berman explains this by observing that the English common law was simply the customary law that was administered by the royal courts–that "royal enactments established procedures in the royal courts for the enforcement of rules and principles and standards and concepts that took their meaning from custom and usage. The rules and principles and standards and concepts to be enforced . . . were derived from informal, unwritten, unenacted norms and patterns of behavior."[37]

More recently, the Anglo-American common law has come to be identified with the rules of law that arise from appellate judicial decisions issued within a hierarchical system of courts that are bound by the doctrine of *stare decisis* (precedent). Because this is a system in which rules are often consciously created by judges, it is but a dim shadow of the traditional, customary common law. Nevertheless, it retains sufficient ability to learn and grow for me to include it within the ambit of the analogy I am attempting to draw.[38] This is because of both the limited scope for judicial legislation and the inherent trial and error method of legal evolution that common law systems permit.

The ability of judges to create law is severely limited by the context in which they

function. Judges act only when there is a case before them. This means that there has to be an actual conflict between members of the community for judges to be involved. Appellate judges issues rulings only when there is an unresolved question of law–only when the currently operative rules of law do not clearly and adequately resolve conflicts of the type that gave rise to the case. Thus, in deciding the appellate cases that create new law, common law judges are always seeking rules that will fairly resolve such conflicts–rules that will convert contentious situations into cooperative ones.[39]

Of course, as human beings, judges are subject to the same epistemic limitations as everyone else. Judges are no better at anticipating future consequences and overcoming their personal biases than legislators. Common law judges may be trying to find a rule that facilitates peaceful cooperation, but there is no reason to think that they will always succeed. The fact that common law judges often "make errors" is not problematic, however, because the common law is a trial and error learning system.

When judges make rules that are not effective at reducing social strife, interpersonal disputes continue to arise, which causes the issue to be relitigated. Eventually, a judge hearing a subsequent case proposes a different rule. If this rule is no better, the process repeats itself. When a rule that facilitates cooperative interaction is tried, conflicts subside, the issue is not relitigated, and the rule persists. It is through this built in trial and error process that the common law overcomes the epistemic limitations of the judges who comprise it and discovers the rules that tend to promote peaceful and productive social interaction.

We can now see that the essential feature that both customary and common law legal systems share is that they are legal systems in which the rules of law evolve without a guiding

human intelligence. The judicial body is stimulated into action by the irritant of interpersonal conflicts that give rise to lawsuits. That body keeps working until it finds the proper unguent to relieve the irritation–until it finds the rules that are acceptable enough to all parties to promote peaceful cooperation, at which point the conflicts that stimulate change subside.

Is the duty to obey the law produced by a customary/common law legal system analogous to the attorney's professional obligation?

Like the attorney's professional obligation, the duty to obey the law requires individuals to conform their behavior to a code of rules even when doing so conflicts with their personal moral judgment. Yet, also like the attorney's professional obligation, the duty to obey the law does not require individuals to submit to the conscious authority of any human agency or commit them to follow commands to engage in immoral action.

Like the attorney's professional obligation, the justification for the duty to obey the law produced by a customary/common law legal system is that it is a component part of a social institution that helps human beings overcome their inherent epistemic limitations. The professional obligation of attorneys is a component of the adversarial system of justice that teaches human beings what justice requires in particular cases. The duty to obey the law is a component of the customary/common law legal system that teaches human beings what rules are productive of peaceful interaction in society.

Finally, like the attorney's professional obligation, the duty to obey the law is a reasonably strong prima facie duty. There will be cases in which individuals can have a high degree of certainty that obeying the law will have morally pernicious results, and in which disobedience is the morally proper course of action. But given human beings' epistemic limitations–given their

limited ability to trace the systemic consequences of their actions and their known susceptibility to personal biases–it is rational to doubt individuals' ability to accurately determine the cases in which exempting themselves from the law is the morally proper course of action. Especially with regard to the rules of customary or common law, which long experience has shown to be productive of social peace, there is good reason to believe that individuals are obligated to obey the law unless they possess very strong evidence that they are facing one of the exceptional situations.

This comparison suggests that along most moral dimensions, the duty to obey the law of a customary or common law legal regime is analogous to the attorney's professional obligation. Further, we have good reason to believe that the attorney's professional obligation is morally well-grounded. Can we conclude from this that the duty to obey the law of a customary or common law legal regime is similarly morally well-grounded?

C. Step 3: Grounding the Duty to Obey the Law

The answer to this question would seem to be an obvious no. There is a clear disanalogy between the attorney's duty to abide by the Canon of Ethics and the individual's duty to obey the law. The attorney's duty is voluntarily assumed. The duty to obey the law is not.

No one is compelled to become an attorney. Those who enter the profession are fully aware of the obligations they assume by doing so. Upon their admission to the bar, they swear an oath to practice law in accordance with the Canon. Further, with the exception of cases in which attorneys are appointed by the courts to represent indigent clients, attorneys are free to decide which clients they wish to represent. Thus, they may choose not to take on clients whose representation appears likely to produce a conflict between their professional obligations and their

personal moral judgment. Within certain limits, it is fair to say that attorneys choose to be bound by their professional obligations.

Such is not the case with regard to the duty to obey the law. No voluntary act of acceptance is required for the duty to obey the law to attach. The duty binds individuals regardless of their consent.

There is a long line of thinkers stretching back to Plato, who argue that the duty does in fact derive from the consent of the individual, although this consent is expressed implicitly rather than explicitly–e.g., by remaining in the country, accepting the benefits provided by the legal regime, voting, etc. Because, in my judgment, this line of argument has been effectively refuted,[40] I cannot appeal to it to preserve the analogy between the attorney's professional duty and the general duty to obey the law. I accept that the duty to obey the law does not derive from any voluntary action on the part of those it binds.

The moral force behind the attorney's duty is consent. Each attorney is bound by his or her own freely given promise to comply with the Canon of Ethics and the basic ethical obligation to keep one's word. No such voluntary commitment grounds the individual's duty to obey the law. Assuming the duty to obey the law shares the morally desirable features of the attorney's professional obligation, there is still be the question of where the moral force of the duty comes from. In the absence of consent, what morally binds individuals to fulfill the duty?

The only available answer appears to be that individuals have to do so to fulfill one of their natural moral duties. In the absence of consent (or any other transactional or associative grounding), individuals could be morally obligated to obey the law only if it were necessary for them to meet one of the fundamental moral obligations that they possess as human beings.

This means that two challenges remain if I am to complete the argument. First, I must identify the underlying moral obligation that is served by the existence of a duty to obey the law. Second, I must show that the duty to obey the law is necessary for individuals to fulfill that obligation.

1. Identifying the Natural Duty

Most natural duty arguments attempt to demonstrate that a duty to obey the law is directly necessary to fulfill a duty to attain a fundamentally important moral end. I am not embarrassed to admit that I am not a good enough moral philosopher to make such a demonstration. I have little confidence that I can provide a creditable account of the nature of fundamental moral values such as the common good, justice, human flourishing, or respect for autonomy, or that I would be able to demonstrate that there is a natural duty to attain them even if I could. Hence, I propose to do the next best thing. I will attempt to demonstrate that a duty to obey the law is *indirectly* necessary to the attainment *any* fundamentally important moral end. I will argue that a duty to obey the law is necessary to attain an instrumental moral value, social peace, that is itself necessary to the attainment of all fundamentally important moral ends. Hence, I will claim that human beings have a natural moral duty to promote social peace.

To do this, I will offer an analog of the Rawlsian concept of a primary good. John Rawls defined primary goods as "things that every rational man is presumed to want [because t]hese goods normally have a use whatever a person's rational plan of life."[41] Primary goods have universal instrumental value because "whatever one's system of ends, primary goods are necessary means."[42] Thus, goods such as health, intelligence, liberty, and wealth are all primary goods.

In a similar vein, I want to suggest that there are certain moral values–let's call them "primary values"–that every moral theory regards as valuable because they normally advance the realization of the ultimate end of the (consequentialist or Aristotlean) theory or are entailed by the fundamental principles of the (deontological) theory. Primary values are those that have universal instrumental moral value because whatever a moral theory's ultimate goals or requirements, primary values are means to their fulfillment.[43]

I believe that social peace is such a primary value. Reducing the level of interpersonal violence within a community to facilitate cooperative behavior is instrumentally valuable, regardless of the ultimate moral end one is pursuing and regardless of whether one adheres to a consequentialist, Aristotlean, or deontological ethical theory. Whatever the ultimate ends of a consequentialist moral theory, social peace makes their realization more likely. Whether one seeks the maximization of one or the optimal increase in each of many human goods such as pleasure, happiness, the satisfaction of rational desires, social wealth, knowledge, friendship, etc., peace is a necessary prerequisite to the achievement of the theory's goal. Further, whatever an Aristotlean moral theorist may mean by human flourishing, a peaceful social environment is necessary for its realization. It is much more difficult for one to live well or reach one's potential when surrounded by strife. Finally, it is difficult to imagine a deontological moral standard that does not either explicitly prescribe peaceful behavior or implicitly require a peaceful environment for human beings to behave as it does prescribe.

Social peace is a primary value because it is an universal instrumental value–it is a prerequisite for or facilitates the realization of all fundamental moral values. This means that even if I am unable to specify what natural moral duties individuals possess, I can nevertheless know

that actions that promote social peace will help individuals fulfill them. I submit that this is equivalent to the claim that human beings have a natural moral duty to promote social peace. This duty–the duty to promote social peace–is the natural duty that is served by the existence of a duty to obey the law of a customary/common law legal system.

2. Demonstrating Necessity

If human beings have a duty to promote social peace, what can they do to meet it? If humans were omniscient, they could consider both the immediate and remote consequences of their actions on all members of their society, and take only those actions that were most conducive to peaceful social relations. But human beings are not omniscient. They have a severely limited ability to track the long-term and systemic consequences of their actions. They also have a severely limited ability to escape the influence of psychological, ideological, and political factors that tend to bias their judgment and distort their evaluation of these consequences. Given the epistemic limitations inherent in the human condition, the best individuals can do to promote social peace is to conform their behavior to rules that have been shown to reduce the incentive for violence and encourage cooperation.

But stating that the duty to promote social peace requires individuals to conform to peace-enhancing rules is not very helpful. This is because it immediately leads to the question of how human beings can know what constitutes a set of peace-enhancing rules. The same epistemic limitations that prevent human beings from directly perceiving the actions that promote social peace also hamper their efforts to directly identify the rules that promote social peace.

Human beings have only one way of overcoming these epistemic limitations and learning which rules tend to promote cooperative behavior: trial and error experience. And this means that

they must utilize the evolutionary processes inherent in customary and common law legal systems. By trying myriad solutions to the problems that bring human beings into conflict, discarding those that do not reduce conflict and retaining those that do, the customary/common law legal process slowly teaches human beings which rules are effective at promoting social peace. Because the rules of customary and common law are always in the process of evolving, they are never entirely satisfactory. There are always current problems for which adequate conflict-reducing rules have not yet been found, and old rules that need adjustment to keep up with changes in technology, social mores, and moral development. But the system's built-in self-correcting mechanism slowly but surely discovers the new or revised rules needed to replace conflict with cooperation.

The record of the customary/common law process for identifying peace-enhancing rules is quite impressive, as those of us residing in the United States or any of the British Commonwealth countries should be, but typically are not, aware. Almost all of the law that facilitates peaceful and cooperative interaction–the law that provides the infrastructure of our commercial society–is a product of the customary/common law process. Tort law, which provides compensation for wrongful personal injury; property law, which demarcates property rights; contract law, which provides the grounding for exchange; and commercial law, which facilitates complex business transactions all slowly evolved through the customary/common law's trial and error learning mechanism. None of this law was produced by the conscious actions of legislators.

Customary and common law legal systems speak with the voice of experience about what promotes social peace. The rules such systems produce embody decades or centuries of accumulated wisdom about what most effectively reduces violence and encourages cooperation. If individuals have a duty to promote social peace, then they have a duty to obey the rules of law

that develop in a customary or common law legal system *because, given the epistemic limitations inherent in the human condition, these rules are the most reliable guide available to what actually promotes social peace.* Hence, a duty to obey the law of a customary/common law legal system is a *epistemic* necessity for fulfilling one's natural duty to promote social peace.

Notice that the argument I am advancing cannot give rise to a duty to obey the law of a state-administered legislative system. This is because the rules created by such legislative legal systems are not necessarily peace-promoting rules. In legislative systems in which the law is consciously created by human beings, the law can be designed serve any purpose those in control of the legislative machinery find desirable on ideological or other grounds. The law can be designed to perfect human character, to paternalistically protect individuals from their own folly, to create a more equalitarian society, to enforce religious conformity, to suppress vice, to maximize individual liberty, to segregate races, to integrate races, or to favor politically powerful interests at the expense of the politically powerless. Under such legal regimes, it simply would not be true to say that the rules of law were a reliable guide to what produces social peace.

Legislative legal systems are relatively ineffective at producing peace-promoting rules because the rules are consciously created by epistemically limited individuals with diverse ends and diverse theories of justice. Customary and common law legal systems do better precisely because they function without any guiding human intelligence. Because customary and common law legal systems are conflict resolution systems that function without conscious control by any identifiable human beings, they serve no other purpose than the resolution of interpersonal human conflicts. They automatically go about their business of discovering and revising the rules that facilitate cooperative behavior among members of the relevant community.

A natural duty to promote social peace cannot give rise to a general duty to obey the law. It cannot give rise to a duty to obey the law created by a legislative legal system. But it can give rise to a duty to obey law that is created by a process designed to overcome human beings' epistemic limitations and identify the rules that most effectively channel conflict into cooperation. It can give rise to a duty to obey the law of a customary or common law legal system.

V. Definitional Requirements

As noted in Section II(A) above, the duty to obey the law must be a prima-facie, comprehensively applicable, universally borne, content independent obligation to conform one's behavior to the law of one's community. The duty that I have argued for–the duty to obey the law of a customary or common law legal system–satisfies each of these requirements.

The duty is clearly a prima facie one. Individuals have a duty to obey the law of a customary or common law legal system because doing so is necessary for them to fulfill their natural duty to promote social peace. However, the duty to promote social peace is not their only moral duty. Although social peace is an especially important instrumental value, it is nevertheless an instrumental value. It may be overridden when it comes into conflict with more fundamental moral values.

For example, the common law does not embody any particular theory of justice and contains no guarantee that the law that evolves will not sometimes produce unjust results. In cases in which adherence to the peace-enhancing rules of law would be unjust, the duty to obey the law could be overridden by the duty to act justly. In this respect, customary and common law is no different from legislation. Under any legal system, there can be cases in which civil disobedience is the morally proper course of action.

Further, the duty is comprehensively applicable and universally borne. It is comprehensively applicable because all the rules that evolve in a customary/common law legal system evolve because they reduce interpersonal conflict. Therefore, all of them help individuals fulfill their natural duty to promote social peace. And the duty is universally borne because all members of the community are equally bound by the natural duty to promote social peace.

Finally, the duty is content independent. The duty to obey the law does not arise from the content of the rules, but from the method by which they were formed. The duty does indeed "preempt[] the subject's individual assessment of the merits of the action required by law and is categorical in the sense that it is not contingent upon any motivating end or goal of the subject."[44] It preempts the subject's individual assessment of the merits of the action required by law because the information contained in the rules of law is more reliable than the subject's individual assessment. And it is not contingent upon any motivating end or goal of the subject because it is necessary for the subject to fulfill his or her natural duty to promote social peace.

VI. Meeting the Challenges

I have offered a natural duty argument for the duty to obey the law. I believe that it can meet each of the four major challenges to such arguments.

A. The Problem of the Morally Compelling End

To succeed, natural duty arguments must identify the morally compelling end that creates an obligation for all members of the relevant society to obey the law. Many fundamentally important moral ends have been offered to fill this role, e.g., the common good, the support of just institutions, respect for individual rights, rescue from significant harm, etc. The difficulty for all such arguments lies in showing why a duty to obey the law is necessary for individuals to

satisfy their natural duty to promote them.

My argument is distinct from most of those that have been previously advanced in that I do not claim that a duty to obey the law is necessary to attain a fundamental moral end or an intrinsic moral value. The morally compelling end that I offer, social peace, is an instrumental, not an ultimate, value. But it is a special kind of instrumental value–an universal instrumental value that promotes all more ultimate moral values. Promoting social peace is a step toward the promotion of, for example, the common good, just institutions, individual rights, and the ability to rescue or protect individuals from harm. Thus, there is a derivative, but real, moral duty to promote it. I submit that its utility in helping human beings fulfill any and all of their natural moral duties is sufficient to qualify social peace as the type of morally compelling end that can sustain a natural duty argument for the duty to obey the law.

Other natural duty arguments founder on their inability to show how a duty to obey the law is necessary for individuals to fulfill their natural moral duties to promote the relevant morally compelling end. But this is because they are actually arguments for political obligation rather than the duty to obey the law. These arguments are efforts to show that a duty to obey the rules of law *consciously created by state legislative agencies* is necessary to fulfill one's natural duty, whether it be to promote the common good, support just institutions, respect individual rights, or rescue people from significant harm. But state legislative agencies can produce law that serves any number of purposes, many of which may be irrelevant or antithetical to the promotion the end in question. These arguments fail because they cannot show that a duty to place oneself under the conscious authority of a state and conform one's behavior to the directives of other human beings is necessary to fulfill one's natural moral duties.

My argument does not face this difficulty. It is not an argument for political obligation. To succeed, it need only show that the duty to obey the law produced by a customary or common law legal system is necessary for individuals to fulfill their duty to promote social peace. It does this by showing that the former is *epistemically* necessary for the latter.

Customary and common law legal systems create law without a guiding human intelligence. The trial and error process by which the law is produced serves no purpose other than that of resolving the interpersonal conflicts that give rise to legal disputes–that is, of promoting social peace. In customary and common law legal systems, the trial and error process that creates the law is also the most effective practical method human beings possess for learning what promotes social peace. Without the knowledge embodied in the rules of law, human beings simply cannot know how to fulfill their duty to promote social peace. The customary/common law process *identifies* rules that promote social peace. The duty to obey them attaches because they *are* rules that promote social peace, and, given human beings' epistemic limitations, the only way for individuals to fulfill their natural duty to promote social peace is to conform their behavior to them.

B. The Problem of Particularity

A second major hurdle for natural duty arguments for the duty to obey the law is to explain how a general duty that all persons possess in their capacity as human beings can bind individuals to obey any specific code of laws. As A. John Simmons points out, "[i]t is easy to see why Socrates should promote justice. It is much harder to see why Socrates should specially support Athens or regard himself as specially bound by Athenian law if it really is after all the importance of *justice* that explains his duty."[45] Although this may be true, it is not that hard to see

why Socrates should regard himself as bound by an Athenian law produced by the customary or common law process if it is the importance of *social peace* that explains his duty.

There are many paths to social peace. There typically will be many different rules that can successfully channel a particular type of conflict into cooperation. There is no telling which of these a particular customary/common law legal system will stumble upon first–no telling which will first give rise to the interactional expectancies that create the rules of customary law or which will be the first to be tried by a common law judge. Customary/common law legal systems do not produce optimal solutions for the problems causing conflict, just ones that are sufficient to make cooperation relatively more appealing than conflict. As a result, beyond the bare minimum of rules necessary to ensure the physical safety that all communities must have to function, the rules of customary and common law that develop in different communities will be different. The customary/common law process does not teach us what rules promote social peace in the abstract. It teaches us what rules promote social peace in particular communities *given the common history and experience of the members of that community*.

The natural duty that undergirds the duty to obey the law is the duty to promote social peace. The only way to fulfill that duty is to abide by rules that promote social peace. The rules that promote social peace differ for different communities. Therefore, the duty to promote social peace is the duty to obey the law of the particular community one finds oneself in.

The argument I offer in this article is indeed an argument for a general duty to obey the law. However, it is an argument for a *general* duty to obey the law of the *particular* customary or common law legal system one is functioning in. This argument is not distressed by the particularity problem because particularity is inherent in the duty being advocated.[46]

C. The Problem of Legitimacy

The problem of legitimacy is the problem of providing a justification for investing some human beings with the authority to restrain the autonomy of others. In the words of A. John Simmons,

> legitimating an arrangement that involves some claiming the authority to control others involves showing that a special arrangement of a morally weighty kind exists between those persons, such that those persons should have authority and those particular others should have a duty to respect that authority. . . . Only a legitimating special relationship, not a justifying virtue or benefit, can ground claims of authority and subjection. Control of some by others is personal; so must be its legitimation.[47]

My argument is not beset by the problem of legitimacy. Legitimacy is a major problem for arguments for political obligation because political obligation subjects some human beings to the control of others. But I am not offering an argument for political obligation. I am offering an argument for a duty to obey the law produced by customary/common law legal systems.

The duty to obey the law that I argue for is a duty to obey the rules that emerge from a trial and error learning process that functions without any guiding human intelligence. The duty does not place its bearer under anyone else's control or entail an obligation to respect anyone's else's authority. The problem of legitimacy does not apply to my argument because there is no authority to legitimate.

D. The Problem of Harmless Disobedience

Harmless disobedience is a considerable problem for arguments that are designed to show that a *comprehensively applicable* duty to obey the law is necessary for the for the attainment of a morally compelling end. This is because a "specific individual's failure in a particular case to obey certain traffic laws, tax laws, environmental regulations, and many other types of laws, will often

have no discernable effect, or even any effect at all, on the ability of the state to provide its subjects with secure enjoyment of their basic moral rights"[48] or achieve the common good or do justice or rescue people from the dangers of the state of nature. In general, "universal obedience is as a matter of fact not necessary to achieve plausible social ends–such as order, harmony, or substantive justice."[49]

However, once again, the problem of harmless disobedience, which is a serious problem for arguments for political obligation, is not a problem for the argument I am offering. Because legislation can serve any end human imagination can devise, state administered legal systems can include any number of rules against harmless activities. It will be very difficult to show that compliance with *all* such rules is necessary to achieve any compelling moral end. But I am arguing not for political obligation. I am arguing for the duty to obey the law created by customary or common law legal systems, which rarely if ever create rules that may be harmlessly disobeyed.

The customary/common law process does not create rules requiring one to stop at a stop sign in the desert when it is clear that no other drivers are in the area. The common law of tort requires one to drive with reasonable care. It rarely if ever imposes absolute duties. Running a stop sign is tortious when, and only when, it creates an unreasonable risk of harm to others.[50]

Customary and common law arises out of the settlement actual cases. Cases arise only when there is an injured party–only when someone suffers some sort of harm. Hence, the rules that evolve are almost always rules designed to reduce harmful or threatening behavior. The mechanism that creates customary and common law affords little opportunity for the formation of rules that regulate harmless behavior.

I have argued that individuals have a natural duty to promote social peace. It follows that

if all the laws that are produced by a customary/common law legal system tend to reduce conflict and promote social peace, then individuals have a duty to obey *all* the laws of that legal system. The duty to obey the law of a customary/common law legal system is comprehensively applicable because for a rule of law to evolve in such a legal system, it must be a conflict reducing rule. In such a legal system, the problem of harmless disobedience can rarely, if ever, arise.

VII. Conclusion

Human beings regularly identify the law with the state. When we think of law, we inevitably think of legislation–the law consciously created by king or congress. We unreflectively identify law with rules by which some human beings–those invested with political authority–control the behavior of the members of society.

We should know better. We live in a society in which the vast majority of the law that allows us to cooperate without violence did not come from those with political authority. Almost all of the law that provides security–tort and criminal law–and facilitates cooperation and exchange–contract, property, and commercial law–evolved through the customary/common law process that was the heart of the Anglo-American legal system. This law, which is "the result of human action, but not the execution of any human design,"[51] is not the product of any guiding human intelligence. It is not a mechanism by which some human beings control the behavior of others.

It is true that much of our contemporary law is a product of legislation. And it is perfectly natural for us to focus on this portion of the law *because it is the portion of the law that gives rise to strife*. The struggle to impose one party's view of the good society or the demands of justice on others takes place through the legislative process. We notice the legislative portion of

the law because it is what we fight about. We overlook the portion of the law produced by the customary/common law process because it works so well. The purpose of that portion of our law is to reduce interpersonal conflict. It does this so effectively that most of us rarely notice its existence. It fades into the background of our lives in the prosperous commercial society that it makes possible.

I have been guilty of misidentifying law with legislation myself. My longstanding belief that there cannot be a moral duty to obey the law stems from my improper association of the law with the existence of a morally binding political authority. My firm belief that one can never escape moral responsibility for one's actions on the ground that one was "just following orders," led me to believe not only that there could not be a duty to conform one's behavior to the dictates of those with political authority, but also that there could not be a duty to obey the law. But the latter implication does not follow. When we recognize that the law consists of not only legislation, but also the results of the customary/common law process, we can see that there can be a duty to obey the law without there being a duty to submit to political authority. The duty to obey the law produced by the customary/common law process does not entail a duty to obey the directives a political authority. It does not entail the existence of political obligation. Hence, our inability to provide an cogent argument for political obligation does not imply that there is not one for the duty to obey the law.

Nevertheless, the duty to obey the law still needs justification. The duty to obey the law of a customary/common law legal system may not require one to relinquish one's moral judgment to other human beings, but it does require one to relinquish one's moral judgment. Joseph Raz has pointed out that no argument for the duty to obey the law can succeed unless there is reason to

believe that the lawmakers are better able to determine how individuals should fulfill their moral duties than the individuals themselves.[52] Given human beings' epistemic limitations, this observation is the bane of all arguments that involve human lawmakers. However, it points to the strength of the argument that I am offering. For the customary/common law process is the method by which human beings simultaneously make law and discover what most effectively facilitates social peace. The social institution that is the "lawmaker" of a customary/common law legal system is not merely better at determining what behavior promotes social peace than are the individuals subject to the law it makes, it is the individuals' only reliable source of knowledge on the matter. The justification for the duty to obey the law of a customary/common law legal system is that individuals can know that they are acting in a way the promotes the primary value of social peace only by obeying the law.

An interesting implication of my argument is that there can be a duty to obey the law even under anarchy. Anarchy is the absence of the state, not the absence of law. Human beings need rules that regulate their behavior to live together in society. In the absence of a state, there must be other sources of these rules. Customary law and common law are these sources.

It is true that for several centuries the common law of England and the United States has been made in courts provided by the state. But this is not necessary for the functioning of a customary/common law system, and was not true during the formative periods of English law. With the exception of property law, almost all of the common law of England evolved outside of the royal courts; contract law in the ecclesiastical courts, commercial law in the merchant courts, tort law in the local hundred, shire, and manorial courts. The customary/common law process is the method by which human beings bring order to their lives in the absence of centralized political

authority. As such, it is the law of anarchy. And because this law teaches human beings how to live together in peace and social peace is a genuine moral value, even under anarchy, there can be a duty to obey the law.

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2.Matthew H. Kramer, "Moral and Legal Obligation," in Martin P. Golding and William A. Edmundson, eds., *Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford: Blackwell, 2005), 179.

3.William A. Edmundson, "State of the Art: The Duty to Obey the Law," *Legal Theory* 10 (2004): 215-259 at 216.

4.Ibid., 215.

5.See, e.g., David Lefkowitz, "The Duty to Obey the Law," *Philosophy Compass* 1, no. 6 (2006): 571–598, at 571, where after explicitly recognizing that "there is more to the modern state than its legal order, and not every legal order exists within a state," Lefkowitz nevertheless ignores the distinction stating, "the terms 'law,' 'legal,' and 'state' will be used interchangeably; for instance, by referring in some cases to a duty to obey the law, and in other to a duty to obey the state (or the state's directives)"; and Edmundson, *supra* note 3, at 217, where after recognizing that "[r]ecent usage has tended also to conflate the duty (or obligation) to obey the law with what is referred to as 'political obligation,'" Edmundson nevertheless recommends that "the term

'political obligation' . . . should be understood to refer preeminently to the duty to obey."

6.Philosophical anarchism is the position that holds that although states are morally illegitimate, there does not exist a "a strong moral imperative to oppose or eliminate states; rather [philosophical anarchists] typically take state illegitimacy simply to remove any strong moral presumption in favor of obedience to, compliance with, or support for our own or other existing states." John A. Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001), 104.

7.Lefkowitz, *supra* note 5, at 572.

8.A. John Simmons, "The Duty to Obey and Our Natural Moral Duties," in Christopher Heath Wellman & A. John Simmons, *Is There a Duty to Obey the Law* (Cambridge: Cambridge University Press 2005), 93-196, at 102.

9.Edmundson, *supra* note 3, at 229.

10.See, e.g., John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press 1971); Jeremy Waldron, "Special Ties and Natural Duties," *Philosophy and Public Affairs* 22 (1993): 3–30; David Lefkowitz, "A Contractualist Defense of Democratic Authority," *Ratio Juris* 18 (2005): 346-64; John Finnis, "The Authority of Law in the Predicament of Contemporary Social Theory," *Notre Dame Journal of Law, Ethics, and Public Policy*, 1 (1984-1985): 115-37; Christopher Heath Wellman, "Samaritanism and the Duty to Obey the Law," in Christopher Heath Wellman & A. John Simmons, *Is There a Duty to Obey the Law* (Cambridge: Cambridge University Press 2005), 3-89.

11.Edmundson, *supra* note 3, at 235.

12.Ibid.

13.John Finnis, "Law as Co-ordination," *Ratio Juris* 2 (1989): 97-104, at 133. (Political authority

has its most thorough explanation as the source of solutions to coordination problems. . . . [problems] where, if there were a coordination of action, significantly beneficial payoffs otherwise practically unattainable would be attained by significant numbers of persons, where there is sufficient shared interest to make some such coordination attractive, and where the problem is to select some appropriate pattern of coordination in such a way that coordination will actually occur.).

14.See Rawls, *supra* note 10, at 333–355 and Waldron, *supra* note 10.

15.See Christopher Heath Wellman, "Toward a Liberal Theory of Political Obligation," *Ethics* 111, no. 4 (2001): 735-759, at 745.

16.Lefkowitz *supra* note 5, at 590.

17.Joseph Raz, "The Obligation to Obey: Revision and Tradition," *Notre Dame Journal of Law, Ethics, and Public Policy*, 1 (1984-1985): 139-155, at 152.

18.Simmons, *supra* note 8, at 174.

19.Simmons, *supra* note 8, at 166. See also, Lefkowitz, *supra* note 5, at 592 ("A second objection leveled against all natural duty accounts involves their inability to justify the particularity of the duty to obey the law. Granting for the sake of argument that an agent's fulfilling her natural duties requires support for just political institutions, and that such support must take the form of obedience to law, critics argue that natural duty theorists cannot demonstrate why agents must obey the law of the state that claims jurisdiction over them, rather than, at least in some cases, the law of some other state."); Jeremy Waldron, *supra*, note 10, at 5 ("The first objection is that a theory basing the requirement of obedience simply on the quality of legal and political institutions is unable to explain the special character of a person's allegiance to the particular society in which

he lives.").

20.Simmons, *supra* note 8, at 148-49. See also, Robert Ladenson, "Legitimate Authority," *American Philosophical Quarterly* 9 (1972): 335–341; Edmundson, *supra* note 3, at 223.

21.Edmundson, *supra* note 3, at 235.

22.Christopher Morris, *An Essay on the Modern State* (Cambridge: Cambridge University Press, 1998), 214.

23.Lefkowitz, *supra* note 5, at 590.

24.Edmundson, *supra* note 3, at 235.

25.ABA Model Code of Professional Responsibility (1983), EC 4-1.

26.ABA Model Code of Professional Responsibility (1983), EC 7-1.

27.See James Surowiecki, *THE WISDOM OF CROWDS* (New York: Doubleday, 2004), 3-22.

28.Space does not permit a detailed description of the nature of customary and common law. Hence, I provide only a telescoped overview. For a fuller account, see John Hasnas, "Two Theories of Environmental Regulation," *Social Philosophy and Policy* 26 (2009): 95-129, at 108-115 (2009); John Hasnas, "Hayek, Common Law, and Fluid Drive," *New York University Journal of Law and Liberty* 1 (2005): 79-110, at 81-98; and Todd Zywicki, "The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis," *Northwestern University Law Review* 97 (2003): 1551-1633, at 1582-89.

29.Lon L. Fuller, "Human Interaction and the Law," in Kenneth Winston, ed., *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Durham, NC: Duke University Press, 1981), 212. In what follows, I rely heavily on Lon Fuller's exceptionally lucid account of the nature of customary law that I can do little to improve upon.

30.Fuller, *supra* note 29, at 213-14.

31.Ibid., 219-20.

32.Ibid., 228.

33.Adam Ferguson, *An Essay on the History of Civil Society* (1767), Part 3, § 2.

34.Please note that I am making no claim that systems of customary law always reduce violence or promote justice. The brief account provided applies only in circumstances in which the rules evolve free from pre-existing distorting or oppressive influences–when the rules evolve in a normative "state of nature." Customary law that develops within incentive structures that promote oppression will tend to be oppressive. My argument in this article is that individuals can have a duty to obey the law when their community is governed by a system of customary law *that evolves free from pre-existing state or other oppressive power structures*.

35.William Blackstone, *Commentaries on the Laws of England, Volume 1*, (Oxford: Clarendon Press, 1765), 65.

36.Frederick Pollock, *First Book of Jurisprudence, Sixth Edition* (London: Macmillan & Co., 1929), 254.

37.Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), 480-81.

38.In this context, please banish from your mind any association of this discussion with the high profile Constitutional decisions made by the Supreme Court of the United States. The current discussion applies only to judicial behavior in common law cases, not cases in which judges interpret Constitutions or statutes, which are the type of consciously created state law that I am excluding.

39.Common law judges are never in a position to make up rules out of whole cloth or create rules as a mechanism of social control as legislators are. The need for a plaintiff to bring a case means

that there must always be harm to some individual's interest before judges can get involved. There are no victimless torts. No harm to an individual means no plaintiff. No plaintiff means no lawsuit. No lawsuit means no judicial ruling. No judicial ruling means no rule of law.

Note also that the evolution of rules takes place at the appellate level. That is, when there is either no rule governing a type of conflict or the currently operative rule is unclear, archaic, or produces putatively unjust results, appeals from jury verdicts allow judges to attempt new resolutions that can create new or reshape old rules of law. Such evolution is not stimulated by any and all violations of law. For when an effective rule of law exists, violations of it are easily resolved at the trial level and do not give rise to appeals. The law of battery has been stable for centuries. The fact that individuals continue to commit batteries does not produce change because the assignment of liability for battery does not raise any controversial questions of law that can generate controversial appeals.

40.See Simmons, *supra* note 8, at 115-120.

41.Rawls, *supra* note 10, at 62.

42.Ibid., 93.

43.I originally introduced the idea of primary values in a previous contribution to this journal. See John Hasnas, "Toward a Theory of Empirical Natural Rights," *Social Philosophy and Policy*, 22 (2005): 111-147, at 140-42.

44.Edmundson, *supra* note 3, at 215.

45.Simmons, *supra* note 8, at 166.

46.Note that the duty that I advocate–the duty to obey the law of the particular community one finds oneself in–also resolves other problems that dog arguments for the duty to obey the law

such as whether foreign visitors are bound to obey the local law or whether the duty can apply to nongeographical communities. Because the duty I advocate is a duty to obey the law of the particular community one is in, foreign visitors would be bound by it. Further, there is no reason why the duty cannot extend to nongeographical communities in the proper circumstances.

47.Simmons, *supra* note 8, at 148-49.

48.Lefkowitz, *supra* note 5, at 590.

49.Edmundson, *supra* note 3, at 235.

50.Oliver Wendell Holmes famously attempted to create a common law duty for all drivers to stop, look, and listen at railway crossings before proceeding in 1927. (See Baltimore & Ohio Railroad v. Goodman, 275 U.S. 66 (1927)). This duty lasted only seven years before being overruled in 1934. (See Pokora v. Wabash Railway, 292 U.S. 98 (1934)).

51.Adam Ferguson, *An Essay on the History of Civil Society* (1767), Part 3, § 2.

52.Raz, *supra* note 17, at 151.